Watson Wyatt
Worldwide

November 20, 2009

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Room 5203, Internal Revenue Service
PO Box 7604, Ben Franklin Station
Washington, DC 20044

Dear Sir or Madam:

This letter is the response of Watson Wyatt & Company to proposed Joint Board of Enrolled Actuaries regulations to be codified at 20 C.F.R. Part 901 relating to the enrollment of actuaries under section 3042 of ERISA. The proposed regulations are published at 74 Fed. Reg. 48030 (Sept. 21, 2009). Watson Wyatt Worldwide is a global human capital and financial management consulting firm specializing in employee benefits, human capital strategies, and technology solutions. Founded in 1878 as an actuarial consulting firm, Watson Wyatt combines human capital and financial expertise to deliver business solutions that drive shareholder value. Watson Wyatt employs approximately 7,500 associates on a worldwide basis, approximately 350 of which are Enrolled Actuaries under ERISA. As the firm's Resource Actuary and Senior Counsel in the United States, we have prepared our response with input from others in the firm.

First, we commend the Board's work reflected in the proposed regulations. Many of the proposed changes are helpful and reasonable, particularly the shift in the core hours continuing education requirement for experienced Enrolled Actuaries. We do, however, have several concerns about the changes proposed for Section 901.11 regarding the requirement to attend sessions in person and Section 901.20 regarding standards of performance of actuarial services. The changes in Section 901.20 can be broadly categorized for their potential impact in three areas: (1) some overlap with existing standards of conduct for actuaries imposed by professional associations which could create a risk of inconsistent interpretation and applications of standards; (2) some ambiguities that may lead to unintended non-compliance that could be cured with clearer guidance; and, (3) in some cases, the potential for unfavorable unintended consequences. The change proposed in Section 901.11 appears to ignore technological advances that have occurred since the regulations were first issued and seem unnecessarily restrictive by excluding the possibility of complying with education requirements by attending webcasts.

We appreciate the opportunity to comment on the proposed regulations. Our concerns are expressed below.

Section 901.11—Enrollment Procedures

Watson Wyatt & Company RESEARCH AND INNOVATION CENTER
901 N. Glebe Road \ Arlington, VA 22203 \ 703 258 8000 *Telephone* \ 703 258 8585 *Fax*

The proposed changes to the continuing education requirements specify that "in any event, no less than 1/3rd of the total hours of continuing education credit required for an enrollment cycle must be obtained by attending *in person* a formal program or programs within the meaning of paragraph (f)(2)(ii)(A) of this section." Section 901.11 [emphasis added]

In order to be a formal program, the participant must attend in person a qualifying program that is also attended "by at least three individuals engaged in substantive pension service in addition to the instructor, discussion leader or speaker."

Many of the continuing education opportunities today involve the use of webcasts. We believe that the requirement to actually attend a meeting in person is inconsistent with today's technology and unnecessary, and could have the unintended consequence of inhibiting compliance with the continuing education requirements. At a minimum, we believe attendance at a webcast with at least two other individuals engaged in substantive pension service with an appropriate sign-in sheet should qualify as attendance at a formal program. In addition, we also believe that live attendance at a webcast session that requires a sign-in, sign-off mechanism or similar technology to monitor attendance without the three person attendance should also be sufficient to qualify as a formal program.

Subsection (b)—Professional Duty

The proposed change in Subsection (b)(3) requires an Enrolled Actuary to report a material violation of Section 920 to the Executive Director. This proposal could be subject to each of the three concerns expressed above.

First, there is a risk that the proposed change may be enforced inconsistently with Precept 13 of the Code of Professional Conduct, creating potential confusion by Enrolled Actuaries subject to the Code over the precise scope of their duties under the new rule. Proposed Subsection (b)(3) differs from Precept 13 by requiring a report even if the perceived violation is resolved and cured; Precept 13 does not.

In addition, no guidance is provided to help the Enrolled Actuary gauge what the threshold for materiality may be for this new federal regulation. For example, is any investigation or communication required to confirm whether a violation exists, or is the obligation triggered by any facts that provide an appearance of a potential material violation without further inquiry?

Requiring notice without guidance on the level of inquiry required may invoke the discipline process on what, in hindsight, may be insufficient information or appearances taken out of context. These unintended consequences could be addressed by: (i) requiring the complaining Enrolled Actuary to contact the accused Enrolled Actuary to verify factual context of the work, if possible; (ii) establishing a mediation source or other instrumentality to weigh the seriousness or validity of the violation; (iii) require an Enrolled Actuary to follow Precept 13 or other procedures for the professional organization of which the accused Enrolled Actuary is a member; or (iv) provide additional guidance on the materiality and types of violations necessary to trigger a reporting obligation.

Furthermore, because a rule already existed in the form of Precept 13, we question the need for the proposed rule. We believe that individuals (be they Enrolled Actuaries or others) who feel strongly that perceived violations of actuarial standards of practice should be reported and should be encouraged, but not required, to do so and, if required, that guidance should be clearer. While essentially well-meaning, we worry that this change could result in multiple reports of the same potential violation to the Executive Director of the Joint Board of Enrolled Actuaries since every Enrolled Actuary who learns of a circumstance that may suggest a material violation (including those possibly involved in an existing professional disciplinary process) would have to report it to the Executive Director or risk losing his or her enrolled actuary status. Also, if all the attendees at an Enrolled Actuaries meeting learn of a potential material violation, would each enrolled actuary be required to report it? This could occur under the proposed rule. Since Precept 13 already describes a process for reporting and the Actuarial Board for Counseling and Discipline (ABCD) has already established a process for investigating and disciplining actuaries, we suggest that the JBEA coordinate with the ABCD on discipline issues rather than require possibly redundant reporting to the Executive Director.

Subsection (d)—Conflicts of Interest

Proposed Subsection (d) raises the potential for similar issues by expanding the conflict of interest rules currently applicable under Precept 7 of the Code of Professional Conduct.

After restating language analogous to Precept 7, Subsection (d)(2) adds the requirement that the actuary's "representation" of the client, [should] not be "prohibited by law." The reference to "representation" or advocacy is a new concept, and the departure from the language of the current prevailing standard. Under Precept 7 the actuary does not serve as a partisan advocate or representative of the client; instead, the precept reflects the reality that the actuary's duty is to "perform" a well-defined class of professional services. Adding this new concept may unintentionally change the role of the actuary in a manner that is not intended or fully appreciated by the profession. Some guidance on which laws, exactly, would prohibit an actuary from performing services would also be helpful, and would doubtless enhance compliance.

Perhaps the most problematic issue with the proposed rules is the new requirement of broad disclosure of any perceived conflict, in writing, and requiring consent from individuals who may not have a material stake in the work to be performed. Under the proposed rule, written consent to any *potential* conflict is required of *all* of the following:

> the plan trustees, any named fiduciary of the plan, the plan administrator thereof, and, if the plan is subject to a collective bargaining unit, the collective bargaining representative, and all such principals have expressly agreed, in writing, to such enrolled actuary performing the actuarial services.

Proposed Section 901.20(d)(2). Under current rules a pension fund may consent to a disclosed conflict; under the proposed rule the continued services of the Enrolled Actuary could be vetoed by a *single* dissident board member without further analysis or appeal, since the consent of "all" plan trustees would be required without regard to reasonableness and motivation. Moreover, this veto is not limited to plan trustees. If the plan trustees were to unanimously consent to the continued employment of an Enrolled Actuary, this decision could be vetoed by "*any named fiduciary*" without regard to their need to rely on the actuary's services. What if, for example, the investment advisor preferred a different choice than the trustees? The trustees' choice could be thwarted with a simple refusal to waive a perceived conflict, without regard to the reasonableness or motivation of the veto. We believe the consent should be limited to those bodies or entities that are principals whose interest is truly affected rather than any individual or entity that happens to be a fiduciary without regard to capacity.

Depending on the examples provided for what constitutes actual or potential conflicts of interest, we believe that the regulations should consider a collective bargaining representative to be a principal for this purpose only if the pension plan is a multiemployer plan. We believe the requirement is unnecessary and not intended to be applied to a single employer plan that just happens to have participants who are members of one or more collective bargaining units.

While the intention to avoid conflicts by disclosure is to be applauded, this expansion of required disclosures could trigger adverse unintended consequences if taken literally. One consequence could be vesting dissident fiduciaries with the power to veto the will of the plan's trustees over their choice of actuary. Another could be to exclude large firms from providing actuarial services, driving the work to very small firms that may be less equipped to deal with large benefit plans. Another unintended consequence may be to create a disincentive to report potential conflicts in order to avoid triggering a process that could be unlikely to result in unanimous consent of all possible fiduciaries.

Furthermore, neither the preamble of the proposed amendments to Section 901 nor the proposed amendments contain examples of what constitutes actual or potential conflicts of interest. Given the charge in ERISA 103(a)(4)(A) to "engage, *on behalf of all plan participants* (emphasis added), an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section", the conflict of interest language in Subsection (d) can be interpreted very broadly. We believe it would be helpful if the final regulations provided some clear guidance to Enrolled Actuaries and other individuals in this potentially broad area.

Subsection (f)—Due Diligence

Our next comment regards proposed Subsection (f)(1), which adds a new due diligence requirement in preparing government filings, "determining the correctness of oral or written representations" to government agencies that enforce ERISA, and, the correctness of oral or written representations to clients. Subsection (f)(1) is expanded by Subsection (f)(2), which provides that while the Enrolled Actuary:

> may generally rely in good faith without verification upon information provided by a client. The enrolled actuary may not, however, ignore the implications of information furnished to, or actually known by, the enrolled actuary and must

make reasonable inquiries if the information furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

Proposed Section 901.20(f)(2). Guidance on what the kind of inquiries the Board would consider to be reasonable and would be helpful in uniform and consistent application of this new and untested due diligence rule. Also, some guidance on how to address differing ranges of verification that the client may be able to provide should be addressed. For example, what must an Enrolled Actuary do if the client can provide no better than incomplete information, perhaps for reasons out of its control? Should the actuary refuse to proceed? Should the actuary refuse to proceed even if this would have disproportionately severe implications to the plan? Better guidance would enhance the purpose of the proposal while preventing undue harm to clients.

Subsection (g)—Solicitations

Proposed Subsection (g) includes new prohibitions against misleading promises or promotional materials or statements used in acquiring work. However, the proposed language carries the potential for several unintended consequences. For example, while an actuary should know what a "false" or "fraudulent" statement is, a "coercive" statement is something new to professional terminology. It is not intuitively or objectively clear what might be viewed as a "coercive" statement in promotional materials by an Enrolled Actuary or, indeed, their legal counsel. Also, the prohibition against any "misleading or deceptive statement or claim" is susceptible to the subjective view of the client, the client's lawyers, or others rather than the actuary. This kind of subjectivity might be avoided by punishing only statements that "*the enrolled actuary knows or should reasonably know* to be misleading or deceptive." Adding this kind of clarity should have the effect of enhancing compliance.

Subsection (g) also punishes a solicitation that "violates Federal or State law" and prohibits association with any non-actuary who may be involved in such solicitations. Subsection (g) does not, however, provide any specificity to help Enrolled Actuaries determine which laws the Board has in mind. Identifying representative examples would be very helpful so Enrolled Actuaries will understand what the Board has in mind.

Subsection (h)—Prompt Disposition of Pending Matters

Next, Subsection (h) proposes a requirement that an enrolled actuary may not unreasonably delay the disposition of any matter before the Internal Revenue Service, Department of Labor or Pension Benefit Guarantee Corporation. While the concept is certainly appropriate, this does beg the question of what factors will constitute an "unreasonable" delay, and what factors, if any, would mitigate such a determination. Actuaries do not provide services in a vacuum and must rely on the timely cooperation of clients and their service providers. The proposed rule does not differentiate between delays primarily caused by others and those caused by an actuary's neglect.

Subsection (j)—Return of Client Records

Finally, Subsection (j) details circumstances under which the Enrolled Actuary must return a client's records. At the risk of oversimplification, the intention of Subsection (j) appears to mandate a return of (1) documents provided by the client and its agents, and (2) copies of returns or other final deliverables prepared for the client as long as the client has paid for the deliverable or return sought by the client.

While we understand the rationale for providing clients with the final deliverables for which it has paid, final deliverables are often created using proprietary processes and systems, and that work is often provided on the understanding that it will be used only for the purpose for which it is created. Actuaries often preserve their intellectual property rights and restrict the use of actuarial work to its intended purpose either expressly, by contract or disclaimer, or implicitly. To reduce the likelihood of misuse of documents returned under Subsection (j), it would be helpful to include in the proposal some acknowledgement that nothing in the proposal is intended to limit, revoke or compromise any intellectual property rights in systems or processes used to prepare work. It would also be helpful to acknowledge that nothing in the proposal is intended to abrogate, modify or nullify any statements by the actuary limiting work to its intended purpose.

Thank you for this opportunity to comment on the proposed revisions. Pursuant to the proposed regulations, we hereby request a public hearing to discuss the proposed regulations and would like to participate in such a hearing. We are available to answer any questions that you may have. You may contact Ken Steiner directly at (703) 258-7626 and Paul Meyer at (703) 258-7564.

Sincerely,

Kenneth A Steiner

Kenneth A Steiner, F.S.A.
Resource Actuary

Paul A. Meyer
Senior Counsel